

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff,

v.

JAMES A. MAGGIO; TRADE RISK
MANAGEMENT, LLC (Washington); and
TRADE RISK MANAGEMENT, LLC
(Oregon),

Defendants.

CASE NO. C05-5766RJB

ORDER ON PLAINTIFF'S
MOTION FOR SANCTIONS FOR
DEFENDANTS' FAILURE TO
COMPLY WITH DISCOVERY
ORDER AND ON
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER

This matter comes before the court on the Plaintiff's Motion for Sanctions for Defendants' Failure to Comply with Discovery Order (Dkt. 47) and on Defendant's Motion for Protective Order (Dkt. 48). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint, the defendants sell a stock market analysis service known as Sigma Band Charting through an internet website and materially misrepresent the risk and profit-making ability of the service. Dkt. 1 at 2. The complaint alleges that the defendants' conduct violates the Commodity Exchange Act ("the Act") and Commodities Futures Trading Commission regulations. *Id.* at 7.

On December 15, 2006, the plaintiff requested "[a]ll documents relating or referring to

1 any and all algorithms, or mathematical or statistical calculations, utilized to calculate or to
2 determine the ‘Sigma Bands’ referenced or described in any and all versions of the website
3 www.traderiskmanagement.com.” Dkt. 28 at 1. The Court granted the plaintiff’s motion to
4 compel a response to this request. Dkt. 33.

5 The defendants’ attorney withdrew by Order of this Court on May 31, 2007, and the
6 defendants were unrepresented in this matter until substitute counsel appeared on behalf of the
7 defendants on June 25, 2007. Dkt. 38; Dkt. 46. The defendants have not yet complied with the
8 Order Granting Plaintiff’s Motion to Compel Defendants’ [sic] to Produce Discovery Documents
9 (Dkt. 33).

10 On June 25, 2007, plaintiff filed a motion requesting sanctions for the defendants’ failure
11 to comply with the Court’s Order. Dkt. 47. Plaintiffs request that the court bar defendants from
12 supporting their claim that Sigma Band charts give customers a 99% chance of making money
13 every time they trade, or, in the alternative, issue an order striking the parts of defendants’ answer
14 in which they deny the material misrepresentation claim that is based upon the allegation that
15 Sigma Band charts give customers a 99% chance of making money every time they trade. *Id.*

16 On July 10, 2007, defendants, through their newly retained counsel, filed a response
17 opposing plaintiff’s motion for sanctions. Dkt. 48. Defendants do not oppose disclosure of the
18 information, provided that the court enter a protective order, protecting the information from
19 dissemination to his competitors and other individuals in the field. Dkt. 48. Defendants have
20 provided a proposed protective order which they request be entered by the court. Dkt. 48-2.

21 In its reply, plaintiff states that it has no objection to the proposed protective order, but
22 notes that, once the information is provided by defendants, plaintiff may request that followup
23 discovery related to defendants’ formula be permitted. Dkt. 50.

24 **II. DISCUSSION**

25 Sanctions for failure to comply with an order compelling discovery are governed by
26 Federal Rule 37(b)(2):

27 (b) Failure to Comply With Order.
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1 . . .

2 (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or
3 managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify
4 on behalf of a party fails to obey an order to provide or permit discovery, including an
5 order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order
6 entered under Rule 26(f), the court in which the action is pending may make such orders
7 in regard to the failure as are just, and among others the following:

8 (A) An order that the matters regarding which the order was made or any other
9 designated facts shall be taken to be established for the purposes of the action in
10 accordance with the claim of the party obtaining the order;

11 (B) An order refusing to allow the disobedient party to support or oppose
12 designated claims or defenses, or prohibiting that party from introducing
13 designated matters in evidence;

14 (C) An order striking out pleadings or parts thereof, or staying further proceedings
15 until the order is obeyed, or dismissing the action or proceeding or any part
16 thereof, or rendering a judgment by default against the disobedient party;

17 (D) In lieu of any of the foregoing orders or in addition thereto, an order treating
18 as a contempt of court the failure to obey any orders except an order to submit to
19 a physical or mental examination;

20 (E) Where a party has failed to comply with an order under Rule 35(a) requiring
21 that party to produce another for examination, such orders as are listed in
22 paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply
23 shows that that party is unable to produce such person for examination.

24 In lieu of any of the foregoing orders or in addition thereto, the court shall require the
25 party failing to obey the order or the attorney advising that party or both to pay the
26 reasonable expenses, including attorney's fees, caused by the failure, unless the court finds
27 that the failure was substantially justified or that other circumstances make an award of
28 expenses unjust.

Fed. R. Civ. P. 37(b)(2).

The orderly progress in this case has been inhibited by withdrawal of defendants' first attorney, by the *pro se* status of Mr. Maggio, and by the late entry into the case of defendants' current counsel. In light of defendants' agreement to provide the information requested in discovery, it does not appear that the drastic sanctions requested by plaintiff are warranted. Plaintiffs' motion for sanctions should be denied.

The protective order filed by defendants is deficient in several respects. First, the request is too broad, and the terms of the order give discretion to Mr. Maggio to designate documents subject to the protective order. Any request for a protective order to be entered by the court

1 must be narrowly drawn, clearly identifying the class or type of documents subject to the
2 protective order, and the reason underlying the request for the order. See ¶¶ 1 and 5. Second,
3 each time that the parties propose to file documents under seal, they should file a motion to that
4 effect and show good cause for filing documents under seal. *See* Local Rule CR 5(g). Third, the
5 proposed order includes provisions that are more appropriate for agreements among the parties,
6 and are not the business of the court. See ¶¶ 3, 4 and 6. Finally, the order must contain a
7 provision that the court may change the terms of the protective order on its own motion after
8 notice to the parties and an opportunity to be heard. Defendants' motion for a protective order
9 should be denied without prejudice.

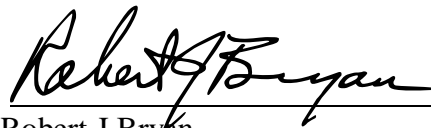
10 **III. ORDER**

11 Therefore, it is hereby

12 **ORDERED** that Plaintiff's Motion for Sanctions for Defendants' Failure to Comply with
13 Discovery Order (Dkt. 47) is **DENIED**. Defendant's Motion for Protective Order (Dkt. 48) is
14 **DENIED WITHOUT PREJUDICE**.

15 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
16 of record and to any party appearing pro se at said party's last known address.

17 DATED this 24th day of July, 2007.

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20 Robert J Bryan
21 United States District Judge
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